IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9473 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANGABHAI BALLUBHAI RATHOD

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

MR MR KT DAVE, AGP, for the respondents.

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 10/04/2000

ORAL JUDGEMENT

#. The Commissioner of Police, Surat City, Surat, passed an order on August 16, 1999, detaining the petitioner-Mangabhai Ballubhai Rathod, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activiteis Act, 1985 ("PASA Act" for short).

#. The detaining authority took into consideration one offence registered against the detenu and statements of three anonymous witnesses. The authority was satisfied that the activities of the detenu are that of a bootlegger and that he is required to be immediately prevented from pursuing his activities, as they are detrimental to public order. The authority observed that resorting to less drastic remedies is not possible. The authority, therefore, passed the order of detention under the PASA Act, detaining the petitioner for a period of one year.

#. The petitioner/detenu challneges the order of detention on various counts. However, Ms. Kachhavah has restricted her arguments to the ground of period of detention having been fixed by the detaining authority while passing the order of detention. She submitted that the detaining authority could not have fixed period of one year as that is not the final order and, therefore, there is a jurisdictional error on part of the detaining authority. Ms. Kachhavah, therefore, submitted that the detention is rendered vitiated and may be quashed and set aside in light of decision in the case of Makhan Singh Tarsikka v. State of Punjab, reported in AIR 1952 SC 27.

#. Mr. K.T.Dave, learned AGP has opposed this petition.

#. Having regard to the contentions raised by the petitioner, assailing the order of detention, if the order of detention is perused, it is categorically stated that the detaining authority detained the detenue for a period of one year in exercise of powers under Section 3 (1) of the PASA Act. The question therefore is whether the detention for specific period of one year by the detaining authority can be supported in law?

#. If the scheme of the PASA Act is seen, the order passed by the detaining authority is required tobe approved by the State Government within 12 days, by virtue of provisions of Section 3(3) of the PASA Act. Section 11 provides that in every case, where a detention order has been made under the PASA Act, the State Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 10, the grounds for detention along with representation, if any, along with report of detaining authority if order is made by an authorised officer. Under Section 12, Advisory Board has to submit its report within 7 weeks of the date of detention of the detenue to the State Government, along with its opinion whether or not there is sufficient

cause for detention. It is therefore clear from the scheme of the Act that the order passed by the detaining authority at the initial stage is not final. The order may be confirmed by the government or may not be confirmed by the government and the detaining authority therefore, cannot at the initial stage fix the period of detention as has been done by the detaining authority in the instant case. The Apex Court in the case of Makhan Singh Tarsikka v. State of Punjab, (supra) has observed as under.

> "4. Whatever might be the position under the Act before its amendment in February 1951, it is clear that the Act as amended requires that very case of detention should be placed before an Advisory Board constituted under the Act (S.9) and provides that if the Board reports that there is sufficient cause for the detention "the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit" (S.11). It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself in the present case was, therefore, contrary to the scheme of the Act and cannot be supported."

This decision would be squarely applicable to the facts of the present case and therefore, the order in question cannot be supported.

#. Division Bench of this High Court in the case of Pravin Mahipatra Mehta & anr. v. District Magistrate, Surendranagar & others, reported in 1993 (1) GCD 671(Guj.) also considered this very question and followed the decision of Makhan Singh Tarsikka (supra). Division Bench of this Court also considered the decision in the case of Mrs. T.Devki & others v. Govt. of Tamil Nadu, reported in AIR 1990 SC 1086 and the decision of Division Bench of the Bombay High Court, in the case of Rajendra Mansukhlal Shah v. Commissioner of Police, Greater Bombay & others, reported in 1989 Criminal Law Journal, 1741 and came to conclusion that where the detaining authority fixed the period of detention in the initial order of detention, the detaining authority usurped the

power of the government and the Advisory Board as per the scheme mentioned in the provisions of the PASA Act Therefore, the detention order was contrary to the Article 22(4) of the Constitution of India and ultimately, the order of detention may be quashed.

#. In view of the above legal position as settled by various pronouncements of the Apex Court by a Bench of five Judges and Division Bench of this Court, the impugned order deserves to be quashed and set aside.

#. The present petition is allowed. The impugned order of detention passed on August 16, 1999 is hereby quashed and set aside. The detenue - Mangabhai Ballubhai Rathod, is hereby ordered to be set at liberty forthwith, if not required in any other matter. Rule made absolute with no order as to costs.

[A.L.DAVE, J.]

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